STATE OF MICHIGAN

COURT OF APPEALS

BEVERLY TRAN,

Plaintiff-Appellant,

v

HAZEL PARK RACING ASSOCIATION, GEORGE ROBINSON and DENNIS TARLTON,

Defendants-Appellees.

UNPUBLISHED
December 13, 2002

No. 234365
Oakland Circuit Court
LC No. 99-016479-CL

Before: Griffin, P.J., and White and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right the judgment entered on the jury's verdict of no cause of action in this sexual discrimination case. We affirm.

Plaintiff's complaint alleged sexual discrimination and hostile work environment harassment. The complaint alleged: (1) that defendants Robinson and Tarlton were management employees who took unlawful advantage of their positions over plaintiff to discriminate against her and to intentionally create or perpetuate a hostile work environment; (2) that plaintiff was subjected to sexual discrimination which took the form of disparate treatment and a hostile work environment; (3) that plaintiff was discriminated against because of her sex and gender; (4) that plaintiff brought her claims to the attention of management but that defendant was not responsive; and (5) that Robinson and Tarlton created a hostile work environment for plaintiff by their words and actions.

On the morning trial began, defendant orally moved in limine to preclude plaintiff from testifying regarding harassment by LaVigne. LaVigne was the director of the mutuel betting department where plaintiff was employed, and the supervisor of Robinson and Tarlton. Defendants argued in support of their motion in limine that plaintiff had testified at deposition that LaVigne harassed her, but plaintiff had not moved to amend her complaint to name LaVigne as a defendant nor made allegations regarding him in her complaint. The court heard argument from both counsel, and noted that plaintiff need not necessarily have named LaVigne as a defendant, but ruled that plaintiff would not be permitted to testify regarding LaVigne's alleged quid pro quo harassment, i.e., his requiring plaintiff to perform fellatio on him in order to keep her job. We find no error.

The role of the complaint is to inform the defendant of the issues against which he will be required to defend. *Wayne Creamery v Suyak*, 10 Mich App 41, 47-48; 158 NW2d 825 (1968). "Decisions concerning the meaning and scope of pleadings fall within the sound discretion of the trial court." *Dacon v Transue*, 441 Mich 315, 328; 490 NW2d 369 (1992).

The Civil Rights Act, MCL 37.2103(i), defines sexual harassment as including unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature when: (1) submission to the conduct or communication is made a term or condition, either explicitly or implicitly, to obtain employment; (2) when submission to or rejection of the conduct or communication is used as a factor in decisions affecting an individual's employment; or (3) when the conduct or communication has the purpose or effect of substantially interfering with an individual's employment. MCL 37.2103(i). The first two categories constitute quid pro quo harassment. *Champion v Nationwide Security, Inc*, 450 Mich 702, 708; 545 NW2d 596 (1996). The third category is hostile work environment harassment. *Radtke v Everett*, 442 Mich 368, 381; 501 NW2d 155 (1993).

Plaintiff's complaint asserted sexual discrimination in the form of disparate treatment and sexual harassment, but only hostile work environment harassment. Plaintiff's counsel later learned that LaVigne had allegedly required plaintiff to perform sexual favors to keep her job, yet did not move to amend plaintiff's complaint to include allegations of quid pro quo harassment, or to include allegations that LaVigne was a participant in the hostile work environment harassment[1] she had already asserted. Even when defendants brought their motion in limine on the first day of trial, plaintiff's counsel did not seek to amend the complaint.

On the other hand, plaintiff asserts, and defendants do not dispute, that defendants had notice well before trial of LaVigne's alleged quid pro quo harassment through plaintiff's answers to interrogatories.[2] At oral argument before this Court, plaintiff stated that her mediation summary also referred to LaVigne's alleged quid pro quo harassment.[3] The fact remains, however, that defendants prepared for a trial of a hostile work environment harassment claim, not quid pro quo harassment. Under the circumstances, we conclude that the trial court did not abuse its discretion by precluding plaintiff from testifying regarding LaVigne's alleged harassment.

Plaintiff also asserts that even if her proposed testimony could not come in to show sexual harassment by Lavigne, the trial court erred in not permitting her to testify regarding LaVigne's harassment for the limited purpose of establishing respondeat superior. We find no error.

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[1] Plaintiff's testimony regarding LaVigne's alleged harassment would have been relevant if she did not complain to him because it would have been futile, but plaintiff's counsel did not argue this. In fact, plaintiff testified that she had complained to LaVigne a number of times regarding Robinson and Tarlton's harassment of her, and that no action was taken.

[2] Plaintiff did not provide any interrogatories to this Court, nor are they contained in the lower court record.

[3] The mediation summary is not in the lower court record nor attached to plaintiff's appellate brief, nor was this argument made below.

We first note that defendant raceway never disputed that it was liable for any discrimination or harassment committed by Robinson and/or Tarlton. Defendants' defense was that the harassment did not happen at all, not that it lacked notice of the harassment or that plaintiff did not report it to the proper personnel. Further, plaintiff in fact did testify at trial that on several occasions she informed LaVigne, who was not only her own supervisor, but also that of Tarlton and Robinson, of the alleged sexual harassment, and that LaVigne did nothing to remedy the situation. Under these circumstances, plaintiff's proposed testimony regarding LaVigne's own participation in plaintiff's harassment was unnecessary to establish the element of respondeat superior.

In a hostile work environment case, a plaintiff must prove by a preponderance of the evidence that her employer failed to take prompt and adequate remedial action after having been reasonably put on notice of the harassment. *Radtke,* at 396-397. Evidence must be relevant in order to be admissible. MRE 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable then it would be without the evidence." MRE 401.

Here plaintiff was seeking to prove that defendant raceway had reasonably been put on notice of Tarlton's and Robinson's harassment of plaintiff, yet had failed to take prompt and adequate remedial action. Plaintiff's proposed testimony was that on at least five occasions plaintiff was forced to perform fellatio on LaVigne in order to retain her job. Testimony that LaVigne engaged in quid pro quo harassment of plaintiff, while potentially suggesting a motive for defendant's failure to take action, if defendant was in fact shown to have failed to take action, does not itself make the existence of notice or a failure to act more or less probable than it would be without the evidence.[4]

Because plaintiff's proposed testimony would have resulted in unfair prejudice to defendants and was unnecessary to establish respondeat superior, we conclude that the trial court

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[4] In any event, we do not discern how allowing plaintiff to testify regarding LaVigne's alleged harassment to establish respondeat superior would have made a difference under the circumstances that the jury was not instructed that plaintiff was required to establish that defendant had notice of the harassment. The trial court read the standard jury instructions, which do not include the issues of respondeat superior or notice. See *Notes on Use* to SJI 105.10, the instruction on sexual harassment, which state:

> The Committee has not drafted instructions on the issues of *respondeat superior,* notice, employer consent, or ratification. Additional instructions are necessary if these issues are present. *See Chambers v Trettco, Inc,* 463 Mich 297; 614 NW2d 910 (2000); *see also Meritor Savings Bank FSB v Vinson,* 477 US 57; 106 S Ct 2399; 91 L Ed 2d 49 (1986). However, an employer is strictly liable for *quid pro quo* sexual harassment committed by supervisory personnel. *Champion v Nationwide Security, Inc,* 450 Mich 702; 545 NW2d 596; *Chambers.*

Plaintiff's case would have been made more *difficult* to establish had the jury been instructed on the notice requirement.

did not abuse its discretion in barring plaintiff from testifying that LaVigne had sexually harassed her.

Plaintiff next argues that the trial court committed an error of law when it refused to give three supplemental jury instructions she requested. We disagree.

The jury was instructed as follows, pursuant to the standard jury instructions:

> The law provides that an employer shall not discriminate against a person regarding employment, compensation, or a term, condition or privilege of employment because of sex.
>
> The Plaintiff must prove that she was discriminated against because of sex. The discrimination must have been intentional. It cannot have occurred by accident. Intentional discrimination means that one of the motives or reasons for Plaintiff's discrimination was sex.
>
> Sex does not have to be the only reason, or even the main reason, but it does have to be one of the reasons which made a difference in determining whether or not to discriminate against Plaintiff.
>
> Your task is to determine whether Defendant discriminated against the Plaintiff. You are not to substitute your judgment for the Defendant's business judgment, or decide this case based upon what you would have done.
>
> However, you may consider the reasonableness or lack of reasonableness of Defendant's stated business judgment, along with all the other evidence, in determining whether Defendant discriminated or did not discriminate against the Plaintiff.
>
> The Plaintiff left the job. Plaintiff claims that she was constructively discharged by the Defendant. Defendant claims that the Plaintiff voluntarily left the job. Plaintiff has the burden of proving that she was constructively discharged.
>
> Constructive discharge means that an employer deliberately made an employee's working conditions so intolerable that the employee was forced to leave the job.
>
> It is necessary [sic] to show that Defendant intended Plaintiff to leave the job, so long as you find a reasonable person in the same circumstances as Plaintiff would have felt compelled to leave the job.
>
> Plaintiff has the burden of proving that Defendant constructively discharged or harassed the Plaintiff, and sex was one of the motives or reasons which made a difference in determining to constructively discharge or harass the Plaintiff. Your verdict will be for the Plaintiff if you find that Defendant constructively discharged or harassed the Plaintiff and that sex was one of the motives or reasons which made a difference in determining to constructively discharge or harass the Plaintiff.

Your verdict will be for the Defendant if you find that the Defendant did not constructively discharge or harass the Plaintiff, but that sex was not one of the motives or reasons which made a difference in determining to constructively discharge or harass the Plaintiff.

Sexual harassment is a form of discrimination prohibited by state law. Sexual harassment means sexual advancements [sic advances], requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature unwelcome to the Plaintiff, if, under all the circumstances, a reasonable person would have perceived the conduct or communication as substantially interfering with the Plaintiff's employment, or having the purpose or effect of creating an intimidating, hostile or offensive employment environment.

The Plaintiff as [sic] the burden of proving that she was sexually harassed by the Defendant. Your verdict will be for the Plaintiff if you find that the Defendant sexually harassed the Plaintiff. Your verdict will be for the Defendant if you do not find that the Defendant sexually harassed the Plaintiff.

* * *

If you decide that the Plaintiff is entitled to damages, it is your duty to determine the amount of money which reasonably, fairly and adequately compensates her for each of the elements of damage which you decide has resulted from the conduct of the Defendant, taking into account the nature and extent of the injury.

You should include each of the following elements of damage which you decide has been sustained by the Plaintiff to the present time: Pain and suffering, mental anguish, fright and shock, denial of social pleasure and enjoyment, impairment, humiliation or mortification.

You should also include each of the following elements include [sic] in deciding what damages the Plaintiff is reasonably certain to sustain in the future: Pain and suffering, mental anguish, fright and shock, denial of social pleasure and enjoyment, impairment, humiliation or mortification.

Plaintiff's counsel stated that he had no objection to the instructions given, but requested the following three supplemental instructions:

The Plaintiff need not show that the Defendants['] conduct affected her psychological well-being or led her to suffer injury to successfully show hostile sexual environment.

If you find that the Plaintiff was sexually harassed and that the Hazel Park Racing Assn. knew or should have known of the sexual harassment, but failed to investigate or take prompt remedial actions, your verdict will be for the Plaintiff against Hazel Park Assn.

> If you find that the Plaintiff was not sexually harassed or that the Plaintiff was sexually harassed but the Hazel Park Racing neither knew nor should have known of the sexual harassment, your verdict will be for the Hazel Park Racing Assn.
>
> The law provides that an employer must have notice of the alleged sexual harassment before it can be held liable.
>
> However, where the alleged harasser is the Plaintiff's supervisor, notice to the employer is presumed.

The trial court declined, stating that the requested supplemental instructions were "of a nature that if the committee had intended to include them, they [were] such that [the court] would have expected them to be included ..." and added that the instructions "were incorrect statements of the law."

When standard jury instructions do not adequately cover an area of law, the trial court must give additional instructions when requested to do so, if the supplemental instructions properly inform the jury of the applicable law and are supported by the evidence. *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 401-402; 628 NW2d 86 (2001). The determination whether the supplemental instructions are applicable and accurate is within the trial court's discretion. *Stoddard v Manufacturers Nat'l Bank of Grand Rapids*, 234 Mich App 140, 162; 593 NW2d 630 (1999). This discretion is to be exercised in the context of the particular case, with due regard for the adversaries' theories of the case and counsel's legitimate desires to structure argument to the jury around anticipated instructions. *Jones v Porretta*, 428 Mich 132, 146; 405 NW2d 863 (1987); *Wengel v Herfert*, 189 Mich App 427, 431; 473 NW2d 741 (1991). A supplemental instruction need not be given if it would add nothing to an otherwise balanced and fair jury charge, nor enhance the ability of the jury to decide the case intelligently, fairly and impartially. *Novi v Woodson*, 251 Mich App 614, 630-631; 651 NW2d 448 (2002).

This Court reviews claims of instructional error de novo. *Cox v Flint Bd of Hospital Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002). With regard to supplemental instructions, a trial court's decision will not be reversed unless failure to vacate the verdict would be inconsistent with substantial justice. *Cacevic v Simplimatic Engineering Co*, 241 Mich App 717, 721; 617 NW2d 386 (2000), vacated in part on other grounds 463 Mich 997 (2001).

The standard instructions read by the trial court do not address the issues of notice or respondeat superior. See SJI 105.10, *Notes on Use*, quoted in n 4 *supra*, which state that "The Committee has not drafted instructions on the issues of *respondeat superior*, notice, employer consent, or ratification. Additional instructions are necessary if these issues are present." Here, defendants' defense was that the discrimination did not occur at all, not lack of notice or notice to improper personnel, and defendant raceway did not dispute that if the harassment occurred it would be liable. Under these circumstances, we conclude that failure to read the two special instructions plaintiff requested regarding notice does not constitute error.

Failure to give the third special instruction plaintiff requested, regarding psychological injury, does not merit reversal. Defendants maintained at trial that plaintiff was unstable, took medication for manic depression, and that if the harassment happened at all, it happened in

plaintiff's head. In closing argument defense counsel stated "nothing bad really happened to her except maybe in her head, and [you should find] that she's not entitled to any damages." Defense counsel also made the erroneous assertion that "plaintiff has to prove somehow she actually suffered some sort of monetary loss." Plaintiff's counsel in rebuttal argued that plaintiff did not have to prove monetary damages. The trial court instructed the jury that if it determined that plaintiff was entitled to damages, it should include the following elements of damage it decided plaintiff sustained to the present time and would sustain in the future: pain and suffering, mental anguish, fright and shock, denial of social pleasure and enjoyment, impairment, humiliation or mortification. The standard jury instruction on damages adequately covered the law.

Affirmed.

/s/ Richard Allen Griffin
/s/ Helene N. White
/s/ Christopher M. Murray